Dr. “Law-Discoverer” and Mr. “Law-Maker”: the Strange Case of Case-Law in France.

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The legal status of case-law is ambiguous in most legal systems. As Lord Scott of Foscote said in his opinion in *National Westminster Bank v Spectrum Plus limited and others* (n. 124),

> *The question whether judges in giving judgments make law or simply declare existing law is one that has been debated by generations of law students in universities and law schools across the globe.*

It is in fact a constitutional matter, a matter of separation of powers. If the judges can “make” the law, doesn’t it make them the equivalent of the legislative power? The legal situation of case-law in France traditionally reflects this ambiguity. However, a recent trend in French law seems to imply that case-law is progressively accepted as a source of law. The latest example of this is a decision from the *Tribunal des conflits* on the 9th March 2015.

The *Tribunal des conflits* (Court of Jurisdictional Conflict) is in charge of deciding which of the two French court systems (the administrative system, headed by the Council of State, or the ordinary court system, headed by the Court of Cassation) has jurisdiction over a particular dispute when a conflict of jurisdiction arises. In its recent decision, the Court overturned a precedent concerning the jurisdiction over disputes arising from the performance of a contract between a concession-holder operating a motorway and a private person. The Court went on to decide that only contracts entered into *after* the decision would be subject to the new legal solution whereas those entered into *before* the decision would still be subject to the previous case-law. In other words, the Court limited any retroactive effect of its ruling.

In order to explain the significance of this decision, one must understand the ambiguity of the traditional status of case-law in French law (1). We will then look at how the decision of the Court of Jurisdictional Conflict confirms a legal trend towards an implicit acceptance of case-law as a source of law (2) before finally examining some of the issues raised by this evolution (3).

1. The ambiguous status of case-law in French law

Officially, case-law is not a source of law in France. The prevailing view in France is that the judges, in the words of Montesquieu, are “the mouth of law”. The judges apply the law, but they do not make the law. This is clearly stated by Article 5 of the French Civil Code, which reads:

> *Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions.*

As a result, case-law in France is officially not recognised as a source of law. This is evidenced by the fact that the French courts never ever mention their own case-law in their decisions.

However, case-law is, *de facto*, an important source of law in France. In Civil law for example, even though this area of law has been codified since the 19th century and the Napoleonic codes, case-law does play an important role. In order to be able to apply very brief articles of the Civil Code to a large and evolving variety of situations, the judges had, sometimes, to be very creative in their interpretation of these articles. However, Administrative law is probably the field in which case-law is the most important source of law. In 1873, in the ground-breaking *Blanco* case, the Court of Jurisdictional Conflict decided that the ordinary rules of Civil law could not apply to

administrative operations. Since there were no specific written rules applicable to this field – no “administrative code” – the Council of State had to create a whole branch of law from scratch.

Moreover, case-law in France tends not to be “fact-based”, like the system of precedents in Common law, but rather “principle-based”. The Courts tend to decide cases based on the application to the individual case of a general principle. This general principle is sometimes created by the judges, and used as a part of the *ratio decidendi*. This principle then becomes a part of case-law and will be applied thereafter by the Supreme Court who created it and by all the lower courts in future cases.

How is it possible then to reconcile the official position with the reality? Mainly by denying the reality. For example, when the Council of State creates a “general principle of law” (a technique which inspired the general principles of European Union law, used by the European Court of Justice), this general principle is said to be “discovered” by the judges. The theory is that the principle was already “there”, embedded in the fabric of law, just waiting to be found. Similarly, when a court interprets a legal provision, even when this interpretation is undoubtedly innovative, it is deemed to be the meaning that this legal provision always had.

This view has significant flaws, which is why it has been strongly attenuated by a recent evolution in case-law.

2. Limiting the retroactive effects of case-law, or the implicit acceptance of case-law as a source of law

The main problem with this position – i.e. that case-law is not a proper source of law – is the fact that case-law has a retroactive effect. In particular, when a Supreme Court overturns a precedent, the new precedent applies retroactively to the parties to the proceedings which led to the ruling and to every person whose situation falls within the scope of the new principle created by the judges. This obviously goes against the principle of legal certainty.

Of course, this is not something that happens a lot. Case-law is usually quite consistent, and all the courts – including the Supreme Courts – tend to stick to it. However, it is also assumed in France that the law must adapt to the evolution of society and that, therefore, case-law cannot remain frozen forever.

How then can we find a balance between the need for judicial innovation and the principle of legal certainty? The answer is simple. We can’t, except by abandoning the retroactive effect of case-law. Up until now, the judges have not dared to do so. However, in a few instances, some courts agreed to limit the retroactive effect of a new solution when it would too dramatically infringe the legitimate expectation of citizens. The 2015 decision of the *Tribunal des conflits* was the first time that this particular Court agreed to do this, but it was not the first time such a decision had been taken in France.

On the 8th July 2004, the Second Civil Chamber of the Court of Cassation decided that victims of a breach of the presumption of innocence who bring civil proceedings against the perpetrator of this breach have to reiterate their willingness to go on with the proceedings every 3 months. By doing so, the judges overturned a precedent dating from 1996. In the particular case though, the judges decided that an immediate application of the new solution would deprive the victim from the right to a fair trial. They decided that the new case-law would not apply to the applicant in the present case. In 2009, however, the First Civil Chamber of the Court of Cassation clearly stated that the retroactive effect of case-law should only be limited in exceptional circumstances and only when a retrospective application of a new case-law would deprive one of the parties of their right of access to the court.

The Administrative Courts have also been willing to limit the retroactive effect of their decision with even less restrictions. The Council of State, in the *Tropic* case (2007) (here in English), accepted for the very first time to limit the retroactive effect of its own case-law. In this case, the Council of State had created a new remedy for third parties against an illegal administrative contract. However, the Council of State clearly stated that this new remedy could not be used against contracts signed *before* the date of the decision. Since then, the Council of State has used this power to limit the past effects of new case-law in another case, this time in order to protect the applicant’s right to an effective remedy (*Conseil départemental de l’ordre des chirurgiens-dentistes, 6th June 2008*).

This is a quiet revolution but a revolution nonetheless. By limiting the retroactive effect of their case-law, the judges shatter the illusion that they just "discover" the law. At first sight, this seems to be a good thing in terms of legal certainty; however, it also raises a few issues.

3. The issues raised by the evolution of the legal status of case-law

Firstly, this evolution raises important constitutional issues similar to those raised by the practice of the "prospective overruling" in the United Kingdom. Lord Nicholls of Birkenhead explained it quite clearly in *National Westminster Bank plc v. Spectrum Plus Limited and others and others* (n. 28):

> *The essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function. It would amount to the judicial usurpation of the legislative function.*

Moreover, in the specific context of French law, separating the texts of law from their judicial interpretation can raise practical issues as well, as evidenced by a recent decision of the Council of State in the *Société d'éditions et de protection route (EPR)* case (2014).

According to the *Gardedieu* case-law (2007) (here in English), any individual can seek damages from the State if they have suffered a wrong as a result of an Act of Parliament being incompatible with an international treaty. In the *EPR* case, an application had been submitted to the Council of State on the basis of this remedy. The applicant company claimed that they had suffered a financial loss due to an Act of Parliament which was not compatible with the EU principles of legal certainty and legitimate expectation. According to the applicant, a case-law dating from 1996 had dramatically, unpredictably and retrospectively changed the meaning of the Act, which had financial consequences for the applicant. The Council of State dismissed the argument, saying that the State could not be held liable, on the basis of this particular *Gardedieu* remedy, for the meaning that had been given to an Act of Parliament by later case-law.

There may have been diplomatic reasons behind this decision. In the *EPR* case, the judicial interpretation had been made by the Court of Cassation, the other French Supreme Court. It is likely that the Council of State did not want to enter into a conflict by assessing whether or not the case-law of the Court of Cassation was "unpredictable". This decision nonetheless confirms the progressive separation between the texts of law and their judicial interpretation in French law. However, the *EPR* case shows that this progressive separation raises several questions.

The first question is about the distinction between the "real" meaning of a legal provision and the meaning "given" to it by case-law. When exactly can we say that the judicial interpretation of a legal provision is far enough from the "reasonable" meaning of its wording to consider that the two are distinct?

The second question is about remedies. Would it be possible to seek damages from the State for a "defective" case-law – let us say, for example, a national case-law incompatible with European Union law? There are, indeed, some remedies in French law which allow parties to seek damages for wrongs suffered as a consequence of a particular court's decision, but can they be expanded to the general consequences of a new case-law, like in the *EPR* case?

Yet, if the French courts, at last, acknowledge their law-making power, maybe they must also accept this basic consequence of the rule of law, that with great power comes great responsibility.

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